MAYBAN FINANCE BHD.

v.

INDUSTRADE CREDIT CORP. SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. D4-22-1048-89]
17 MAY 1991

CONTRACT: *Master agreement - Terms - Two stages in which letter of demand to be issued - First letter of demand to dealer - Second letter of demand to guarantor - Condition precedent - Effect of.*

The plaintiff, a licensed finance company, entered into a block discounting of hire-purchase agreement under a master agreement with the 1st defendant, D1, a private limited company. Under the master agreement, D1 was to submit to the plaintiff a certain volume of hire purchase agreements entered into between D1 and hirers and the plaintiff purchased from D1 the contractual rights of D1 in all the hire-purchase agreements including all rights to payment under the hire purchase agreement; the agreement further provided that the contractual rights of D1 were assigned to the plaintiff.

By a letter of guarantee dated 12 February 1982 the 2nd, 3rd and 4th defendants, D2, D3 and D4, jointly and severally guaranteed payment to the plaintiff of all sums due under the master agreement. The 5th defendant, D5, executed a separate letter of guarantee dated 26 March 1986.

D1 defaulted in payments due to the plaintiff. The plaintiff obtained final judgment against all the defendants. D2, D3, D4 & D5 appealed against the said decision. The Court dismissed the appeal by D3, D4 & D5 and allowed D5's appeal with costs.

The plaintiff now appeals against the decision in respect of D5.

Held:

[1] It was clear from the terms of the letter of guarantee executed by D5 that there were 2 stages in which the plaintiff must send letters of demand to D5. The first written demand was to be given to D5 for the payment by D1. In the event that D1 failed to pay the sums due, only then was the second letter of demand to be sent to D5 asking him to indemnify the plaintiff.

[2] There was no evidence that the first letter of demand was given to D5. As the letter of guarantee executed by D5 stipulates a condition precedent, that is, the sending of the first letter of demand before the second letter of demand is sent to D5, such condition must be satisfied by the creditor before D5 is rendered liable. The second letter of demand was not sent in strict compliance with the terms of the guarantee and was therefore bad. Therefore, D5, when he received the letter of demand, was not liable to the plaintiff.

[Plaintiff's application dismissed.]

Cases referred to:

Green & Anor. v. Kettle [1938] AC 156 ***(foll)***
Holl v. Hadley 2 AD & E 758 ***(foll)***
Midland Countries Motor Finance Co. Ltd. v. Slade [1951] 1 KB 346 ***(foll)***

Other sources referred to:
The Modern Contract of Guarantee, [1985] p. 379 by O'Donovan

For the plaintiff - Abdul Ghani bin Abdullah; M/s. Abdul Ghani & Associates
For the 2nd, 3rd, 4th defendants - Liza Chan; M/s. Liza Chan & Co.
For the 5th defendant - L.H. Chua; M/s. L.H. Chua

JUDGMENT

Zakaria Yatim J:

This is an appeal by the second, third, fourth and fifth defendants against the decision of the Senior Assistant Registrar given on 6 December 1989 allowing the plaintiff to enter final judgment against the four defendants.

The plaintiff is a Licensed Finance Company incorporated in Malaysia with its registered office at No. 16-18, Medan Pasar, Kuala Lumpur. On 12 February 1982 the plaintiff entered into a block discounting of hire purchase agreements under master agreement with the first defendant, a private limited company in Kuala Lumpur.

Under the master agreement, the first defendant was to submit to the plaintiff from time to time a certain volume of hire purchase agreements entered into between the first defendant and the named hirers. Pursuant to the master agreement, the plaintiff purchased from the first defendant the contractual rights of the first defendant in all the hire purchase agreements including all rights to payment under the hire purchase agreements. It was also provided that the first defendant's contractual rights in the hire purchase agreements were assigned to the plaintiff to the effect that the contractual rights in the hire purchase agreements became vested in the plaintiff. Under the agreement, the first defendant undertook to collect punctually as agent for the plaintiff sums due under the hire purchase agreements and to pay the plaintiff promptly. By a letter of guarantee dated 12 February 1982, the second, third and fourth defendants jointly and severally guaranteed upon written demand made to the first defendant, payment to the plaintiff of all sums due under the said master agreement. The fifth defendant executed a separate letter of guarantee on 26 March 1986.

After hearing the submissions of both Counsel for the plaintiff and for the defendants, I dismissed the appeal by the second, third and fourth defendants with costs and allowed the fifth defendant's appeal with costs.

The plaintiff is now appealing against my decision in respect of the fifth defendant.

At the hearing of the appeal I had a look at the letter of guarantee executed by the fifth defendant on 26 March 1986. Clause 1 of the letter of guarantee states:

> In consideration of your agreeing at my ... request to continue from time to time as you shall in your absolute discretion think fit, to accept proposals submitted by Industrade Credit Corporation Sdn. Bhd. of No. 6B, Jalan 19/36, Petaling Jaya, Selangor (hereinafter called the "the dealer") to purchase from the dealer the contractual rights of the dealer in the hire purchase agreements (hereinafter referred to as "the agreements") with the hirers therein named upon the terms and conditions contained in the agreement dated 12 February 1982 made between you and the dealer (hereinafter referred to as "the principal agreements") **I ... hereby guarantee jointly and severally guarantee upon written demand made to me ... by you the payment by the dealer of all sums due under the principal agreement** (whether in respect of the agreements purchased by you prior to the date of this guarantee or in respect of the agreements to be purchased by you subsequent to the date hereof) and the due performance of the dealer's obligations thereunder. (Emphasis added).

Clause 2 of the letter of guarantee states:

> 2. In the event of the dealer failing to observe and perform any of the covenants, undertakings, stipulations and terms contained in the principal agreement **I ... shall on demand forthwith indemnify you** your successors and assigns against all loss or damage suffered and all claims, demands, costs and expenses (including costs as between solicitor and client) made consequent upon such failure. (Emphasis added).

It is clear from the terms of the letter of guarantee that there are two stages in which the plaintiff must send letters of demand to the fifth defendant. The first written demand required under the letter of guarantee is to be given to the fifth defendant for the payment by the dealer, that is, the first defendant (hereinafter referred to as the "first letter of demand"). In the event that the dealer fails to pay the sums due, then, and only then the second letter of demand is to be sent to the fifth defendant asking him to indemnify the plaintiff (hereinafter referred to as the "second letter of demand").

There is no evidence that the first letter of demand was given to the fifth defendant. What was given to each of the defendants was a letter of demand asking the defendants to pay the sum of RM1,217,930.74 and the sum RM318,874.59 being overdue interest. This is clearly stated in para. 17 of the statement of claim:

> 17. In breach of the said master agreement, the 1st defendant defaulted in paying to the plaintiff, the sum of RM1,217,930.74 and overdue interest of RM318,874.59 for hire purchase agreement not assigned and not covered under the deed of assignment dated 13 June 1988 and by separate letters of demand dated 31 January 1989 to the 1st, 2nd, 3rd, 4th and 5th defendants respectively, the plaintiff through their solicitors namely M/s. Abdul Ghani & Co. demanded from the 1st defendant as dealer and the 2nd, 3rd, 4th and 5th defendants as guarantors, the sum of RM1,217,930.74 being the outstanding amount and RM318,874.59 being overdue interest as at 31 December 1988 but the 1st, 2nd, 3rd, 4th and 5th defendants failed, refused and/or neglected either to remedy the breach or to pay the outstanding balance and overdue interest due to the plaintiff.

Paragraph 15 of the affidavit in support of the O. 14 application reiterates para. 17 of the statement of claim. Consistent with the statement of claim and affidavit in support of the O. 14 application, the plaintiff exhibited copies of the letters of demand written separately to each of the five defendants. The letter of demand sent to the fifth defendant was a letter asking the fifth defendant to indemnify the plaintiff under clause 2 of the letter of guarantee.

The fifth defendant, in his statement of defence stated:

> 9. The fifth defendant has no knowledge that 1st defendant company has defaulted in paying into plaintiff the alleged sum of RM1,217,930.74 or any other sum or sums at all and alleged overdue interests of sum of RM318,874.59 or any other sum or sums at all and puts the plaintiff to strict proof thereof.
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> 10. As the said letter of guarantee is unenforceable the fifth defendant is not liable to pay unto the plaintiff the alleged sum of RM1,217,930.59 or any other sum or sums at all.

The letter of demand sent by the plaintiff to the fifth defendant on 31 January 1989 reads as follows:

> Dato' Sulaiman bin Mohd. Amin
> No. 3, Lorong 16/3D,
> 46350 Petaling Jaya,
> Selangor.

Dear Sir

Re: Master Agreement (Block Discounting of Hire Purchase Agreements) dated 12 February 1982 Dealer: Industrade Credit Corporation Sdn. Bhd.

We act for Mayban Finance Berhad of No. 16-18, Medan Pasar, 50050 Kuala Lumpur.

We are instructed to state that on 12 February 1982 the dealer, namely Industrade Credit Corporation Sdn. Bhd. entered into a master agreement (block discounting of hire purchase agreements with our clients for a block discounting facility up to RM2.5 million) wherein the dealer was required to pay on demand to our clients all outstanding installments not remitted to our clients under the various hire purchase agreements despite the deed of assignment dated 13 June 1988.

We refer to the guarantee dated 26 March 1986 wherein you as a guarantor agreed on demand to indemnify our client against all losses and damages suffered by our client in the event that the dealer fails to pay our clients all sums due under the master agreement whether in respect of the agreements purchased by our clients prior to the date of the said guarantee or in respect of the agreements to be purchased by our clients subsequent to the date hereof.

We are to state that the dealer has failed to remit to our client the sums of RM1,217,930.74 being the outstanding balance and RM318,874.59 being interest thereon as at 31 December 1988.

Statement of Account as at 31 December 1988:

(a) amount outstanding RM1,217.930.74

(b) overdue interest RM318,874.59

Take notice that we are instructed to demand from you as guarantor, the said sums of RM1,217,930.74 and RM318,874.59 which we hereby do by this notice, together with a further sum of RM100 being the costs of this notice and the notices to the dealer and other guarantors, to be paid to our clients directly or to us as solicitors for our clients within fourteen (14) days from the date hereof, failing which our clients reserve the right to terminate the agreement with the dealer and to commence legal action against you to recover the said sum without any further notice, in which event you shall be further liable for interest and costs incurred thereafter.

Yours faithfully

Sgd
Abdul Ghani & Co.

In my opinion the letter of guarantee stipulates that it is a condition precedent that the first letter of demand must be sent to the fifth defendant before sending the above letter of demand. Where the terms of the guarantee require that certain remedies be taken against the principal or that certain collateral securities be obtained by the creditor for the principal, such condition must be satisfied by the creditor before the guarantor is rendered liable. O'Donovan, *The Modern Contract of Guarantee* 1985, at p. 379.

In *Holl v. Hadley* 2 AD & E 758, the guarantor gave the plaintiff a guarantee for the value of coals to be supplied to one Nathaniel Hadley on the condition that no application should be made to the guarantor. Coals were supplied to Nathaniel Hadley under the guarantee but no payment was made. The guarantor, in consideration of the plaintiff giving Nathaniel Hadley "two years and upwards" for the liquidation of his debt, agreed to reserve to the plaintiffs all claims that they might have upon him by virtue of the former security and "to be bound by the consequence thereof, if, at the expiration of such period", the plaintiffs had not been paid. Lord Denman CJ, in his judgment in that case said,

His liability then accrued when the principal had made default after two years and upwards, which was the case in the course of April 1822, and the action ought to have been brought within six years of that period. Now none was commenced till July 1828.

The period when the testator's liability attached was sought to be extended by incorporating into the latest guarantee the condition contained in the earliest, that no application for payment should be made to the testator 'but on the failure of plaintiff' utmost efforts and legal proceedings to obtain the same from the principal.' Some doubt may be entertained whether this condition can by a just construction be so incorporated: if it be, it must be read as if it were, 'till after failure of the plaintiffs' utmost efforts,' otherwise they [767] would have the power by their own laches to keep alive the surety's liability forever. The agreement virtually is, (plainly for the surety's protection), that they shall use their utmost efforts against the principal before they call upon the surety. Had they taken prompt measures, it might have been difficult to fix the period when they had failed, under various circumstances that may be imagined. But when they suffered more than two years, during which time the principal was in England, to elapse from the time allowed to a debtor of long standing, we cannot hesitate to say that the utmost efforts were never made, and consequently that they have not performed the condition imposed upon them, which was made precedent to their right to sue on the guarantee.

In *Midland Countries Motor Finance Co. Ltd. v. Slade* [1951] 1 KB 346, a finance company bought a car from a dealer and let it on hire purchase to a hirer who undertook to pay the company a certain sum for down payment and the balance of the payment was to be paid by twelve equal monthly payments. The first payment was payable on 31 August 1948. Contemporaneously with the signing of the hire purchase agreement, the dealer entered into a contract of guarantee with the company. The contact of guarantee, contained a proviso, which stated

that the company shall inform (the dealer) when any payment of instalment shall be more than thirty days overdue.

The hirer paid the company the installments due on 31 August and 30 September, but defaulted on his payment due on 31 October. On 18 November 1948 the company granted an extension of time for the payment of the sum due on 31 October until 30 November. Eventually no payment was made and the company sued the dealer as guarantor. The dealer, relying on the terms of the guarantee contended that the instalment due on 31 October was thirty days overdue on 30 November and that he was not informed of the default until 28 December. The Court of Appeal decided in favour of the dealer. Denning LJ, as he then was, in his judgment at p. 353 said:

At the end of November 1948, it was thirty days overdue, and in order to satisfy the proviso, the company ought within a reasonable time thereafter to have told the guarantor that it was 'overdue'. But they did not tell him so for another twenty-eight days. The proviso was therefore not fulfilled, and the company have not performed the condition under which alone they could avoid the common-law release. Moreover it seems to me that the provision means that the company must inform the guarantor when any instalment under the original agreement, as originally made is more than thirty days overdue; whereas the company's argument involves the proposition that the company need only give the information in respect of an instalment under that agreement 'as varied by any subsequent agreement.' The words are not clear enough to warrant such an unlikely interpretation.

In my opinion, therefore, the condition contained in the proviso was not fulfilled and the company cannot avoid the result of their binding agreement to give time. The guarantor is therefore released.

In *Green & Anor. v. Kettle* [1938] AC 156, the facts were that by an agreement of charge, Mercantile Marine advanced the sum of £250,000 to Austin Friars. Austin agreed to repay the money with interest and charge securities *viz*, 275,000 shares in Iron Industries Ltd. The guarantor executed an agreement of guarantee which contained the following recital:

> Whereas the corporation have at the request of the guarantors advanced to the Austin Friars Trust Ltd. (hereinafter called 'the borrowers') the sum of two hundred and fifty thousand pounds on the security of a charge dated 20 March one thousand nine hundred and twenty-nine on the shares particulars of which are set out in the schedule hereto.

Subsequently it was discovered for the first time that the 275,000 shares in Iron Industries Ltd. had not been validly issued; and accordingly the debt the payment of which the guarantor had guaranteed, had never been secured. Austin Friars failed to repay the loan to the creditor and the guarantor was sued. The House of Lords held that as what the guarantor agreed to guarantee was the repayment of a debt effectively secured by 275,000 fully paid shares in Iron Industries Ltd. and as the debt was in fact not so secured as required by the agreement of guarantee, the guarantor was therefore under no liability.

In my opinion, the authorities which I have referred to above, are relevant and applicable to the present case.

In the present case, since the plaintiff failed to send the first letter of demand to the fifth defendant under clause 1 of the letter of guarantee, the plaintiff has failed to comply with the condition precedent as stipulated in the terms of the letter of guarantee. Accordingly, the second letter of demand was not sent in strict compliance with the terms of the guarantee and was therefore bad. In the circumstances the fifth defendant was not liable to pay the plaintiff when he received the second letter of demand.

For the reasons stated above, I allowed the fifth defendant's appeal with costs.

Also found at [1991] 3 CLJ 1820